

# **Exhibit E**

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

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5 In the Matter of:

6 LEHMAN BROTHERS HOLDINGS, INC., CAUSE NO.

7 et al, 08-13555 (JMP)

8 Debtors.

9 - - - - - x

10 In re

11 LEHMAN BROTHERS, INC., CAUSE NO.

12 Debtor. 08-01420 (JMP) (SIPA)

13 - - - - - -x

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15 U.S. Bankruptcy Court

16 One Bowling Green

17 New York, New York

18

19 November 14, 2012

20 10:02 AM

21

22 B E F O R E:

23 HON. JAMES M. PECK

24 U.S. BANKRUPTCY JUDGE

25 ECRO: MATTHEW

1 HEARING re Notice of Final Applications of Retained  
2 Professionals for Final Allowance and Approval of  
3 Compensation for Professional Services Rendered and  
4 Reimbursement of Actual and Necessary Expenses Incurred from  
5 September 15, 2008 to March 6, 2012 (ECF Nos. 31901)

6  
7 HEARING re Plan Administrator's Cross-Motion to Compel  
8 Giants Stadium LLC to comply with Rule 2004 Subpoenas and  
9 Objection to Giants Stadium's Motion to Quash the Rule 2004  
10 Subpoenas (ECF No. 31652)

11  
12 HEARING re Motion to Quash a Subpoena filed by Bruce E.  
13 Clark on behalf of Giants Stadium LLC (ECF No. 31339)

14  
15 HEARING re Amended Motion of Giants Stadium LLC for Leave to  
16 Conduct Discovery of the Debtors Pursuant to Federal Rule of  
17 Bankruptcy Procedure 2004 (ECF No. 31105)

18  
19 SIPA PROCEDURES

20 HEARING re Motion Pursuant to Federal Rule of Bankruptcy  
21 Procedure 9019 for Entry of an Order Approving Settlement  
22 Agreement Between the Trustee and Lehman Brothers Finance  
23 AG, in Liquidation (a/k/a Lehman Brothers Finance SA, in  
24 Liquidation) (LBI ECF No. 5362)

25

1 HEARING re Trustee's Motion Pursuant to Section 105(a) of  
2 the Bankruptcy Code and Bankruptcy Rules 3007 and 9019(b)  
3 for Approval of General Creditor Claim (I) Objections  
4 Procedures and (II) Settlement Procedures (LBI ECF No. 5392)  
5  
6 HEARING re Debtor's Three Hundred Fifty-Seventh Omnibus  
7 Objection to Claims (Misclassified Claims (ECF No. 31048)  
8  
9 HEARING re Objection to Claim No. 17763 Filed by Laurel Cove  
10 Development, LLC (ECF No. 29187)  
11  
12 HEARING re Three Hundred Twentieth Omnibus Objection to  
13 Claims (No Liability Rose Ranch LLC Claims) (ECF No. 29292)  
14  
15 HEARING re Debtor's Three Hundred Twenty-Ninth Omnibus  
16 Objection to Claims (Misclassified Claims) (ECF No. 29324)  
17  
18 HEARING re Motion for an Order Pursuant to Section 105(a) of  
19 the Bankruptcy Code and Bankruptcy Rule 9019, Authorizing  
20 and Approving the Settlement with Lehman Brothers, Inc. (ECF  
21 No. 43)  
22  
23 HEARING re Turnberry Centra Sub, LLC et al v Lehman Brothers  
24 Holdings, Inc., et al (Adversary Case No. 09-01062)  
25 Transcribed by: Sheila Orms and William Garling

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24 OTHERS PRESENT:

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1 don't think it's fair to say, however, that the debtor has  
2 insight as to why it was done, what's the timing of it, what  
3 the basis of it is. We haven't had insight into any of  
4 that.

5 THE COURT: Well, let me just ask you a question,  
6 and I don't want to know anything about the substance of the  
7 negotiations that took place between the parties. But isn't  
8 the first question that somebody sitting down to the  
9 negotiating table would ask given this fact pattern, how on  
10 earth can you justify an increase from \$301 million to \$585  
11 million, what's that about? Isn't that the first question?  
12 Perhaps not expressed in that way, but I think there would  
13 be an element of huge exasperation built in the question.

14 MR. SLACK: There is that exasperation, and I'm  
15 sure those were the subject of discussions, and again, there  
16 was a piece of paper that's filed. There is an amended  
17 claim that was filed. So, I mean, to the extent that  
18 there's an amended claim, we could look at it and say here's  
19 what's in it. But in terms of why it was done, who made  
20 that decision, why didn't their original financial advisor,  
21 Goldman, reach that amount, you know, two and a half years  
22 earlier.

23 Again, we haven't had any kind of insight into any  
24 of those kinds of questions, and those have not been  
25 answered. And, of course, that's one of the reasons that we

1 wanted to continue the investigation. So that's, I think,  
2 at least from our perspective, you may get another  
3 perspective the answer to number one.

4 In terms of number two, at some point we were  
5 informed once Baupost, Goal Line acquired the interest that  
6 Sullivan and Cromwell was going to jointly represent Giant  
7 Stadium and Goal Line. And so there have been  
8 representatives, you know, Sullivan and Cromwell's been  
9 involved, Baupost has been involved, and representatives  
10 from Giant Stadium have been involved in the negotiations  
11 throughout this period.

12 Now, that's not to say that every conversation  
13 included representatives of all, but all parties at some  
14 level have been involved in negotiations over the past year.

15 And I think that's -- I think that that somewhat  
16 answers at least what we know about question three, which is  
17 why is Sullivan and Cromwell still representing Giants. My  
18 understanding again is that they're jointly representing  
19 Giants and Baupost and Goal Line in connection with this.

20 What I can say is again, we haven't had any  
21 discovery into that sale. We haven't seen the actual  
22 transfer papers between Baupost, and I guess it's Bank of  
23 America. We did see the original papers between Giants and  
24 Bank of America. That's one of the things we asked for  
25 again in our two thousand and --

1 THE COURT: Why is that even relevant at this  
2 point?

3 MR. SLACK: The only thing that potentially is  
4 relevant is exactly I think the questions that you're  
5 asking. We need to understand when we're talking to  
6 somebody, for example, who is the interest. Who should we  
7 be talking to Baupost or not. And that was part of it.

8 The other thing is, Baupost and Giant Stadium were  
9 on opposite sides of that deal. I think we were entitled to  
10 see what was disclosed during those negotiations, and we've  
11 asked to see that. And we -- they're not privileged, and we  
12 should have access to it.

13 THE COURT: Well, whether you should or should not  
14 have access to it, I'm just going to make the general  
15 observation that ordinarily when claims are transferred and  
16 the Lehman case has been one of the largest unregulated  
17 trading markets and distressed claims in the world during  
18 the past four years. There's a routine that I'm familiar  
19 with not from being a Judge, but having been a practitioner,  
20 and you're not likely to find very much of value in the back  
21 and forth relating to that claim tread, at least as it  
22 relates to the value for purposes of any objection you might  
23 file.

24 These are trades between so-called big boys, and  
25 everybody makes their own judgments as to the likelihood of

1 success in future litigation with regard to the claim. You  
2 may or may not be ultimately entitled to obtain that  
3 information, but even if you do, in my view, it's a big so  
4 what.

5 MR. SLACK: Might be. Look, you know, what you're  
6 saying obviously from experience makes sense. What I would  
7 say, Your Honor, is that this is a little bit unlike other  
8 claims, in that it's obviously a very large one. It's  
9 obviously unliquidated. It's obviously the main issues that  
10 somebody looking to buy it are going to be asking themselves  
11 are, at the end of the day, is it a receivable or is it a  
12 payable, and if so, how much.

13 So I think, you know, it's a little bit different  
14 than, you know, a claims market with liquidated claims.  
15 But, you know, that's just the tiniest piece of what, you  
16 know, we were seeking in our 2004.

17 So, Your Honor, would you like to hear the answers  
18 to those questions from counsel, or would you like me to go  
19 ahead with my argument? I mean --

20 THE COURT: I'd like to hear what counsel for Giant  
21 Stadium has to say about the big picture questions that I  
22 raised. And one of the reasons why I'm focused on this is  
23 that I am concerned about more than the discovery dispute  
24 that has been presented to me, I'm frankly concerned as to  
25 why we're having the dispute at all, and why this claim is

1 different from other claims, so many of which have already  
2 found their way into formal claims objections.

3 And I'm interested in that question, but before  
4 getting to it, Mr. Slack, I'd like to hear comments from --

5 MR. SLACK: Okay.

6 THE COURT: -- counsel for Giant Stadium as to some  
7 of the preliminary questions that I asked.

8 MR. SLACK: Sure.

9 MR. CLARK: Thank you, Your Honor. Again, Bruce  
10 Clark for Giant Stadium.

11 Trying to take your questions in order, as to the  
12 increase in the amount of the claim, when the claim was  
13 originally filed, it was filed with five, I believe there  
14 were five caveats as to items that have yet to be  
15 quantified. And when the claim was revised at least two of  
16 those items were the cause of the increase from 301 to 585  
17 million.

18 One of them reflects the amount of a capital  
19 charge, which the person stepping into the shoes of Lehman,  
20 in our view, would've had to incur, in order to protect  
21 themselves by way of reserves against the likelihood of a  
22 further default. And the other was a difference in the  
23 credit charge. That difference came about because the  
24 original deal with Lehman involved raps by insurance  
25 companies, either Figik (ph) or FSA, both of whom at the

1 look at the -- I know Your Honor's familiar with all this,  
2 so I'm not going to belabor it, but if you look at the  
3 background, the Cameron case and all the other cases that  
4 dealt with the origins of Rule 2004. Originally it dealt  
5 with a situation where a receiver came in, wasn't familiar  
6 with the debtor, and had to have an expansive and quick,  
7 quick review of the debtor's assets in order to protect  
8 creditors. That's what any number of the cases have said.

9 It is not an excuse to allow a debtor in the  
10 circumstances present here to just continue with their  
11 investigation because the investigation is preliminary and  
12 not final, and it's final because it's preliminary. That's  
13 what they're saying. It's a little circular, and I think we  
14 ought to move on. Thank you.

15 THE COURT: Okay. Well, thank you for your candor  
16 in answering the Court's questions and in your  
17 presentations. I don't see this as a typical use of Rule  
18 2004. Nor do I see it as a case that will open the  
19 proverbial floodgates of other discovery in part because Mr.  
20 Slack in his presentation, candidly observed that at this  
21 juncture, more than four years into the Lehman bankruptcy  
22 case, his client really doesn't fully understand all  
23 elements of claims arising out of this complicated auction  
24 rate hedge.

25 And it's apparent that if they could determine now



1 that they had an affirmative claim, they would assert it.  
2 Lehman has not been shy about asserting such claims in the  
3 past. Additionally, it seems fairly obvious that if Lehman  
4 had sufficient information available to it that would  
5 support not just a shotgun approach objection but a specific  
6 and tailored objection to the claim, it would file it.

7 Throughout this case, Lehman has been active in  
8 filing and pursuing objections to claims, and in fact, part  
9 of this morning's agenda relates to objections to claims.  
10 And so I view this as an exceptional case. And, in fact,  
11 that was one of the reasons I asked a number of questions at  
12 the outset to determine to what extent the issues that  
13 related to this discovery dispute were exceptional and  
14 unique, and to what extent this was just another example of  
15 a derivatives dispute, this one happening to have the  
16 negative gloss of active discovery disputes, as opposed to  
17 active negotiations leading to a settlement.

18 I believe a continuing 2004 discovery under the  
19 circumstances makes sense, although the fact that this is  
20 occurring 14 months after our last discovery dispute is a  
21 terribly negative fact. One conclusion to be drawn from the  
22 mere timing of this, is that this dispute is taking too long  
23 to resolve, and that despite best efforts, reasonable people  
24 are unable to get to yes, and they should.

25 And so I'm going to propose that counsel meet and

1 confer in an effort to develop what I'll call a reciprocal  
2 discovery protocol, and it is not necessarily limited to  
3 2004. I believe that one of the things that distinguishes  
4 the dispute that I've heard a lot about this morning from  
5 other disputes, is that there is no foreseeable outcome here  
6 in which Lehman is not objecting, or bringing affirmative  
7 claims relief.

8 This is not a situation in which Lehman is engaging  
9 in a 2004 process to later shake hands, and say here's the  
10 money. I also believe even though everybody has denied this  
11 that the 2004 dance that we're engaged in necessarily has  
12 tactical aspects to it. And so here's what I am directing.

13 Between now and the first of the year, I would like  
14 the parties to develop and agreed discovery protocol that  
15 will be applicable whether we're dealing with 2004 discovery  
16 or claims related discovery. It would be extraordinarily  
17 wasteful for the discovery that's taken in 2004 to be  
18 replicated again. And in the case of Ms. Prokopse, that's  
19 already happening. Enough already.

20 I recognize that the 2004 sword is more properly  
21 used by the debtor than by the creditor in this instance.  
22 And so discovery from third parties and discovery from Giant  
23 Stadium and discovery from Goal Line may be more appropriate  
24 than discovery from the debtor. But that does not mean that  
25 some discovery from the debtor is not also to be part of

1 this process.

2 One of the mysteries from the perspective of the  
3 Court is that this third party discovery and discovery from  
4 others is so critical from the debtor's perspective in being  
5 able to formulate its own position with respect to the  
6 claim. But I accept the representations made that ongoing  
7 2004 discovery is needed in order for the debtor to complete  
8 its investigation to use its words.

9 I would ask the parties to report the results of  
10 these efforts at the December omnibus hearing. You don't  
11 have to the point of an agreement, in fact, you could be to  
12 the point of no agreement. I'd like to know that, in which  
13 case I will then be able to either rule or take this matter  
14 under advisement, but I have I think provided sufficient  
15 guidance here to suggest that what I consider to be an  
16 appropriate result is reasonable discovery going in both  
17 directions with the understanding that the need for that  
18 discovery is more obviously greater for the debtor. And  
19 this is not an example of gotcha because I am indicating in  
20 agreement that continued 2004 discovery is appropriate for  
21 the debtor and the debtor's benefit.

22 I'm also noting the time's up in effect. This has  
23 to come to a conclusion. And I don't expect there to be  
24 another discovery dispute between the parties until there's  
25 active litigation between you. And I hope that doesn't

1 occur at that point either. So I'll hear from you next  
2 time.

3 MR. CLARK: Your Honor, just a question of  
4 clarification. How does the January 1st deadline fit with  
5 the next omnibus hearing? I'm not --

6 THE COURT: I don't know.

7 MR. CLARK: Okay.

8 THE COURT: I'm just looking for a status report at  
9 the next omnibus hearing. And if it doesn't fit well for  
10 the parties, it can always be put off, and then we can make  
11 that a telephone conference.

12 MR. CLARK: Thank you, Your Honor.

13 MS. MARCUS: Your Honor, the December hearing is  
14 December 19th.

15 THE COURT: 18th?

16 MS. MARCUS: 19th.

17 THE COURT: That seems like a perfect date for a  
18 status report.

19 MR. MARGOLIN: The omnibus hearing is on December  
20 12th, Your Honor.

21 THE COURT: Why am I hearing different dates?

22 MS. MARCUS: Sorry. Sorry, Your Honor. December  
23 12th, sorry about that.

24 THE COURT: December 12th is a perfect date, too.  
25 Either one's fine.